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Roy Spa, LLC and International Brotherhood of Teamsters, Local 2. Case 19–CA–083329

July 27, 2017

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

On July 12, 2016, Chief Administrative Law Judge Robert A. Giannasi issued the attached supplemental decision.¹ The Applicant filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Applicant filed a reply.²

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order.³

ORDER

The recommended Order of the administrative law judge is adopted and the application of Roy Spa, LLC, for attorneys’ fees and expenses under the Equal Access to Justice Act is denied.

Dated, Washington, D.C. July 27, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ The judge issued an errata on July 20, 2016.

² The Applicant’s request for oral argument is denied as the record and the briefs adequately present the issues and the positions of the parties.

³ Our dissenting colleague agrees that the General Counsel’s position as a whole in the underlying case was substantially justified, and that the EAJA application at issue would properly be dismissed on the merits. He nevertheless dissents from dismissal on the ground that the judge, in his view, abused his discretion by excusing the General Counsel’s untimely filing of his motions for extension of time and to dismiss the EAJA claim. The Board, however, fully addressed the issues presented by those filings in *Roy Spa, LLC*, 363 NLRB No. 183 (2016). Member McFerran did not participate in that decision, but, applying the decision as the law of this case, she agrees to deny the Respondent’s application.

CHAIRMAN MISCIMARRA, dissenting.

This case, which arises under the Equal Access to Justice Act (EAJA),¹ has a somewhat complicated procedural history. The complaint alleged that Roy Spa, LLC (the Respondent in the original case, and presently the Applicant seeking a recovery of attorneys’ fees and expenses under EAJA) was a legal successor to predecessor Old Fashioned Barber with respect to its operations at Malmstrom Air Force Base in Montana. The complaint further alleged that Roy Spa, as a legal successor, violated Section 8(a)(5) and (1) of the National Labor Relations Act by making certain unilateral changes in employees’ terms and conditions of employment without giving the Union notice and an opportunity to request bargaining. Administrative Law Judge Michael A. Marcionese dismissed the complaint on the basis that the Board lacked jurisdiction over Roy Spa. Because he held that the Board lacked jurisdiction, Judge Marcionese did not reach the merits of the alleged unfair labor practices (ULPs) attributed to Roy Spa.

Here is where this case, procedurally, gets more complicated.

Complication #1: After the case was dismissed, Roy Spa filed an EAJA application, and the EAJA application was referred to Judge Marcionese.

Complication #2: The General Counsel filed an untimely motion to dismiss the EAJA application, after filing an untimely motion for an extension of time to file the (untimely) motion to dismiss; the judge granted the extension of time and accepted the General Counsel’s untimely motion to dismiss.

Complication #3: In his supplemental decision, Judge Marcionese granted the General Counsel’s untimely motion to dismiss the EAJA application. According to Judge Marcionese, the General Counsel’s position that the Board had jurisdiction, though incorrect, was substantially justified. However, Judge Marcionese did not address whether the ULP allegations were also substantially justified (i.e., Roy Spa’s alleged violations of Section 8(a)(5) and (1) based on its alleged status as a “successor”).

Complication #4: The Board then reviewed Judge Marcionese’s rulings. The Board majority agreed with Judge Marcionese that the General Counsel’s incorrect position regarding the existence of NLRB jurisdiction was nonetheless substantially justified, but the majority concluded that the General Counsel’s motion to dismiss

¹ 5 U.S.C. § 504 et seq. EAJA entitles certain prevailing parties (other than the government) in litigation before a Federal agency to an award of attorneys’ fees and expenses unless the position of the agency was substantially justified or special circumstances make an award unjust.

could not be granted without an additional finding that the ULP allegations were also substantially justified. *Roy Spa, LLC*, 363 NLRB No. 183, slip op. at 4–5 (2016) (*Roy Spa I*). Accordingly, the majority remanded the case so this additional question could be resolved in the first instance by the judge. *Id.*, slip op. at 5. However, regarding the untimeliness of the General Counsel’s motion to dismiss (and the untimeliness of the General Counsel’s request for an extension of time to file the motion to dismiss), the Board majority upheld the judge’s rulings in favor of the General Counsel, and the majority also allowed the General Counsel to file an answer to the EAJA application. *Id.*, slip op. at 2–4, 5 fn. 17. At times, I have favored leniency when parties fail to comply with Board-imposed deadlines; but for the reasons explained in my dissenting opinion, *id.*, slip op. at 5–8, I dissented from the acceptance of the General Counsel’s untimely motion to dismiss and the untimely request for an extension of time to file the motion to dismiss, as well as from the decision to allow the General Counsel to file an untimely answer.

Complication #5: On remand, Administrative Law Judge Robert A. Giannasi answered the question that Judge Marcionese had left unaddressed—namely, whether there was substantial justification for the allegations that Roy Spa was a legal successor and had violated Section 8(a)(5) and (1). Judge Giannasi concluded that both allegations were substantially justified. In fact, he found that “the violations would probably have been established had the General Counsel succeeded on the jurisdictional issue.” Therefore, Judge Giannasi held that the General Counsel’s complaint as a whole (i.e., as to both jurisdiction and the ULP allegations) was substantially justified, even though the case against Roy Spa was dismissed for lack of jurisdiction. Accordingly, Judge Giannasi dismissed Roy Spa’s EAJA application.

At present, the Board has before it only complication number 5: Judge Giannasi’s ruling that the General Counsel’s successor and ULP allegations against Roy Spa were substantially justified, warranting dismissal of the EAJA application. As to these issues, my colleagues agree with Judge Giannasi, and were I to consider the current record before the Board, so would I.²

Although I would agree that the General Counsel’s position regarding Roy Spa’s alleged successor status is substantially justified, I believe Judge Giannasi overstated the strength of the General Counsel’s case on the mer-

its as to Roy Spa’s alleged successor status, which is the basis for the alleged violations of Section 8(a)(5) and (1). The record creates a reasonable question whether Roy Spa had a substantial and representative complement of employees and was engaged in normal operations on September 1, 2011, the date the General Counsel alleges that Roy Spa’s duty to bargain as a successor attached. Both of these requirements must be satisfied before Roy Spa had an obligation to engage in bargaining with the predecessor’s union. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49 (1987); *Premium Foods Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983). The evidence shows that, as of September 1, 2011, Roy Spa had concrete plans to make substantial changes in its operations approximately 10 months later, and numerous Board and court cases indicate that a planned expansion can raise difficult questions about whether the alleged successor has a substantial and representative complement of employees engaged in normal operations. See, e.g., *Galis Equipment Company, Inc.*, 194 NLRB 799 (1972); *Pre-Engineered Building Products, Inc.*, 228 NLRB 841 (1977), enf. denied 603 F.2d 134 (10th Cir. 1979); *Jeffries Lithograph Co.*, 265 NLRB 1499 (1982), enf. 752 F.2d 459 (9th Cir. 1985). When evaluating an EAJA application, the Board does not decide the merits of the case, and the General Counsel’s pursuit of the litigation—even if the case is ultimately dismissed—is substantially justified “if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 566 fn. 2 (1988). Based on the current record, I would agree that the General Counsel’s position as a whole, including his theory that Roy Spa was liable as a successor employer, was substantially justified under this standard. However, I believe the Board cannot fairly conclude, without reaching and deciding the merits, that “the violations would probably have been established.”

Nevertheless, for the reasons stated in my dissent in *Roy Spa I*, I continue to believe that no reasonable basis supports the acceptance of the General Counsel’s untimely motion to dismiss the EAJA application, the General Counsel’s untimely motion for an extension of time to file the untimely motion to dismiss, and the General Counsel’s untimely answer to the EAJA application. See *Roy Spa I*, supra, slip op. at 5–8 (Member Miscimarra, dissenting). My colleagues adhere to the Board’s prior decision excusing the General Counsel’s untimely filings and thereby perpetuate Judge Marcionese’s erroneous rationale for excusing the General Counsel’s flagrant

² I would also agree that the General Counsel’s position regarding the existence of Board jurisdiction was substantially justified for the reasons stated by Judge Marcionese in his supplemental decision, even though Judge Marcionese ultimately found that jurisdiction did not exist.

disregard of applicable deadlines.³ In my view, the General Counsel's untimely filings in this matter cannot reasonably be excused.⁴ Accordingly, I believe the Board should have stricken the General Counsel's motion to dismiss, not permitted the General Counsel to file an answer to the EAJA application, and directed the judge to resolve the pending EAJA issues based on the record minus these untimely filings. Because I believe that the Board cannot disentangle its disposition of Roy Spa's EAJA application from the acceptance of the General Counsel's untimely EAJA submissions, I dissent from the dismissal of the EAJA application.

Dated, Washington, D.C. July 27, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

Ryan Connolly, Esq., for the General Counsel.

Michael Avakian, Esq., for the Respondent.

Timothy McKittrick, Esq., for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

[Equal Access to Justice Act]

ROBERT A. GIANNASI, Administrative Law Judge. This case deals with an Equal Access to Justice (EAJA) application filed by Respondent after the dismissal of an unfair labor practice complaint against it. The case comes to me on remand from the Board to make a determination whether the General Counsel had "substantial justification" to issue and litigate the underlying complaint, which alleged that Respondent, as a successor

³ Member McFerran did not participate in *Roy Spa I*. She adheres to it as the law of the case.

⁴ As explained in my dissent in *Roy Spa I*:

Roy Spa timely filed its EAJA application on September 12, 2013. The deadline for the General Counsel to file an answer to the application or a motion to dismiss it was extended as a result of the Government shutdown to November 4. On November 20—more than 2 weeks past the deadline—the General Counsel requested an extension of time to file a motion to dismiss. In his request, the General Counsel claimed that the deadline for filing a motion to dismiss was December 10—more than 5 weeks past the correct deadline—and stated, as the sole grounds for the request, that "[g]iven my current work load I do not anticipate being able to complete the Motion to Dismiss until the requested date."

Roy Spa I, supra, slip op. at 5 (Member Miscimarra, dissenting) (footnotes omitted). Thus, the motion to dismiss was untimely, the motion for an extension of time to file the motion to dismiss was untimely, and the General Counsel's vague reference to his "current work load" was patently insufficient to show good cause based on excusable neglect. I believed and continue to believe that Judge Marcionese's decision to grant the General Counsel's untimely motions constituted an abuse of discretion for the reasons explained in the text and in my prior dissent in *Roy Spa I*, supra, slip op. at 5–8.

employer, made unilateral changes in the terms and conditions of employment of union-represented employees, in violation of Section 8(a)(5) and (1) of the Act. See 363 NLRB No. 183 (2016).¹ After the remand, at the direction of the Board, the General Counsel filed an answer to the Respondent's application for fees and the Respondent filed a reply, in accordance with Sections 102.150–153 of the Board's Rules and Regulations. The issue whether the substantive allegations in the complaint were substantially justified is thus joined for my determination.

The Underlying Decision

On June 28, 2013, after a 2-day hearing, Judge Michael Marcionese issued his decision dismissing the General Counsel's complaint alleging that Respondent, as a successor employer obligated to bargain with the Charging Party Union (hereafter, the Union), made unilateral changes to the commission rates of employees and unilaterally enforced a previously dormant employee dress code, in violation of Section 8(a)(5) and (1) of the Act. Most of the decision dealt with whether the Board had jurisdiction over Respondent's operations—a question the judge decided in the negative, thus resulting in a dismissal of the complaint on that ground. The judge nevertheless briefly discussed the substantive allegations of the complaint, ultimately stating that he "need not determine whether [the Respondent's conduct] violated the Act because the Board does not have jurisdiction in this matter."

The judge's decision sets forth the following facts and discussion relevant to the substantive allegations of the complaint:

The Respondent is a Virginia limited liability corporation headquartered in Centreville, Virginia, that operates barber shops or hair care facilities at several military bases in the United States, including the one at Malmstrom Air Force Base in Montana, which is involved in this proceeding. Joyce Cayli and her husband, Hasan Cayli, are members, i.e., owners of the LLC and admitted agents of the Respondent. On July 12, 2011,² the Respondent was awarded the contract to provide hair care services at Malmstrom by Army and Air Force Exchange Services (AAFES), a private nonprofit entity that runs base exchanges for the Department of Defense.³ The previous operator, the Old Fashioned Barber, had notified AAFES in June that it wanted to terminate its contract because the barber shop at Malmstrom was not profitable. The Re-

¹ In its decision, the Board ruled that the General Counsel was substantially justified in asserting jurisdiction over the Respondent, despite the administrative law judge's dismissal of the complaint on the ground that there was no jurisdiction over the Respondent. The remand was based on the judge's failure to consider whether the remainder of the case—the substantive complaint allegations—was substantially justified. The remand came to me because Judge Michael Marcionese, who handled the underlying proceeding and issued the initial EAJA ruling, retired and thus was unavailable to handle the remand.

² All dates are in 2011, unless otherwise indicated.

³ The base exchanges are classified as "non-appropriated fund activities," meaning that no taxpayer dollars are used. AAFES is essentially self-funded, using the revenue from services provided and products sold at the exchange to fund the operation.

spondent commenced operations at Malmstrom on September 1 under a 5-year contract.

* * * *

... The Respondent's facility at Malmstrom is located within the designated security area of the base with limited access to the general public. When Respondent began operations, and for the first 10 months at least, the overwhelming majority of its customers were male members of the military seeking what is commonly referred to as a "regulation" or "military" haircut. Beginning in July 2012, when the Respondent moved its shop to a new base exchange building, it was transformed from a barber shop to a "family hair care salon" with the goal of expanding its customer base to include more women. This change was specifically required by the Respondent's contract with AAFES. In order to facilitate this change, the contract also required for the first time that all of the Respondent's employees at Malmstrom have a cosmetology license. Such a license is broader than the barber's license that several of the predecessor's employees held and allows the licensee to work with chemicals, e.g., for hair coloring and permanents. These are services that are not typically performed for male members of the military.

The record evidence also shows that, while located on a secure military base, the general public does have limited access to the Respondent's facility. A visitor to the base must show identification, and be subject to search at the gate. There is a museum located on the base that the public is invited to visit and school groups often tour the base. The record does not show whether the Respondent has ever provided services to any member of the general public. It appears that the Respondent's customer base is still limited to members of the military, their dependents, contractors working on base and retired military who live in the area. Census records show that approximately 3500 people live on the base, approximately 56 percent of whom are male.

The evidence also shows that, while the Respondent operates the only hair care facility, or barber shop, on base, there are a number of barber shops and salons in the Great Falls vicinity, including one, the Eastside Barber Shop, located just outside one of the gates. It is undisputed that a haircut at the Eastside Barber Shop costs about \$1 less than one at the Respondent's onbase facility. While it may be more convenient for base residents to get a haircut at the Respondent's facility on base, nothing precludes a service member or other potential on base customer from utilizing these other businesses off base.

* * * *

... As previously noted, the previous contractor operating the barber shop at Malmstrom was the Old Fashioned Barber. The Union had a collective-bargaining agreement with that employer which expired on May 5, 2010. On June 30, 2011, after the Union had received notice from AAFES that the Old Fashioned Barber had terminated its contract to operate the shop, effective August 31, 2011, the Union executed a new

collective-bargaining agreement for the term May 6, 2011, through May 5, 2013. The Union did not provide AAFES with a copy of this new agreement until July 7, 2011, after the bid solicitation period for a new contractor to take over the operation had closed. The bid solicitation and the bid submitted by the Respondent were based on there being no collective-bargaining agreement in place.

There is no dispute that the Union's business representative, Max Hallfrisch, and Cayli, the Respondent's owner and agent, had several communications, written and oral from August 2011, through November 2011, in which Hallfrisch attempted to have the Respondent adopt the collective bargaining it had negotiated with the Old Fashioned Barber. It is clear that the Respondent never agreed. While these communications were cordial, and included discussion of several work issues, the Respondent never agreed to recognize the Union as the 9(a) representative of its employees at Malmstrom.

The record evidence also shows that, when the Respondent took over the barber shop at Malmstrom, it retained all of the employees previously employed by the Old Fashioned Barber,⁴ continued to operate the business at the same location serving the same customers, utilizing the same equipment, without any hiatus. However, the record also shows that in July 2012, as envisioned by its contract with AAFES, the Respondent moved to a new location, changed the type of services performed from a barber shop to a full service salon, and change[d] the customer base to increase the number of women for whom it provided hairstyling services. The employee complement also changed between September and July 2012. By the time of the conversion, only three unit employees remained. The other two, who did not have cosmetology licenses, left their employment. The Respondent increased its complement to nine employees, all with cosmetology licenses. In addition, pursuant to the terms of its contract with AAFES, the Respondent changed its hours of operation when it moved to the new location. The Respondent was now open 7 days a week, including Sundays, a day that it had previously been closed.

While the evidence would suggest a general refusal to recognize and bargain with the Union, the complaint only alleges a refusal to bargain regarding two discrete subjects, i.e., the change in commission rate and the adoption of a dress code.⁵ This may very well be due to the fact that any such general refusal to recognize and bargain occurred more than 6 months before the Union filed its charge on June 18, 2012. In any event, the evidence does show that the Respondent did not notify the Union in advance before

⁴ [fn. 5 in original] There were five unit employees and two supervisors working in the Malmstrom barber shop on September 1 who all previously worked for the Old Fashioned Barber.

⁵ [fn. 6 in original] While alleged as a change, the record indicates that AAFES always had a dress code for its concessionaire's employees. The dress code may not have been enforced when the Old Fashioned Barber had the concession.

it changed the commission rate and began to enforce the existing dress code. I need not determine whether this conduct violated the Act because the Board does not have jurisdiction in this matter.

The EAJA Application

No exceptions were filed to Judge Marcionese's decision so it became the final decision of the Board. Respondent thereafter filed an EAJA application to recover its litigation fees. The General Counsel filed a motion to dismiss and the matter was referred to Judge Marcionese, who denied the application solely on the jurisdictional issue. As indicated above, that denial was upheld by the Board, which remanded for findings on the substantive allegations; the General Counsel thereafter filed an answer to the EAJA application and the Respondent filed a reply.

The Applicable Law

"EAJA entitles a prevailing party in an agency adversary adjudication to an award of attorney fees unless the agency's position was 'substantially justified . . . on the basis of the administrative record, as a whole . . .'" *Glesby Wholesale, Inc.*, 340 NLRB 1059, 1060 (2003). Allegations are "substantially justified" when "the evidence is 'what a reasonable mind might accept as adequate to support a conclusion'—i.e., where 'reasonable people could differ' on whether the allegation should be litigated." *Glesby Wholesale*, cited above, 340 NLRB at 1060, quoting *Pierce v. Underwood*, 487 U.S. 552 (1987) and citing other authorities. "This standard is not as demanding as 'justified to a high degree' or 'substantial probability of prevailing.'" *Ibid*, again quoting and citing authorities. As the Supreme Court has made clear, an agency's position can be justified "even if it is not correct . . . if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, cited above, 487 U.S. at 566 fn. 2.

I turn now to the applicable law concerning the substantive allegations of the complaint—that Respondent was a successor employer required to bargain with the incumbent union that represented the employees of the predecessor and that it thereafter made unlawful unilateral changes by changing the employee commission rate and enforcing a dress code rule. It is clear that an employer who has a bargaining obligation may not make unilateral changes in the terms and conditions of employment of employees represented by a union—mandatory subjects of bargaining—without first providing their bargaining representative notice and an opportunity to bargain over the changes. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer who takes over the operations of a predecessor employer whose employees are represented by a union is deemed a successor to the bargaining obligation of the predecessor if there is a "substantial continuity" in the employing enterprise. The focus of that inquiry is whether, from the perspective of the employees, their jobs changed or remained "essentially the same." Important factors in the inquiry—which is a factual one—include whether a majority of the predecessor's employees have been retained by the successor doing the same jobs under the same supervisors; and whether the business of both entities is the same, with the same customers. *Fall River Dyeing & Finishing*

Corp. v. NLRB, 482 U.S. 27, 41–44 (1987). See also *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007). Such a bargaining obligation is based on presumptions of majority status that attach to an existing bargaining agreement or relationship between the predecessor and the incumbent union. *Fall River*, 482 U.S. at 37–40. One such presumption is based on voluntary recognition and the existence of a bargaining agreement (*Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786–787 (1996)), which may only be rebutted by a showing of loss of majority in fact. *Levit Furniture Co.*, 333 NLRB 717 (2001).⁶

It is also well established that a successorship bargaining obligation is measured "at the time the bargaining obligation attaches." Thus, changes that occur later are "irrelevant" to the determination of successorship status. *Cadillac Asphalt*, cited above, 349 NLRB at 9.

The General Counsel was Substantially Justified

As Judge Marcionese stated in his original decision, the facts on the substantive complaint issues are not in dispute. Respondent took over the operations of the Old Fashioned Barber and hired all its former employees, as well as their supervisors. It continued the same hair cutting business at the same location, servicing the same customers, for at least 10 months after the takeover. The employees did the same jobs they did before the takeover. There was no break in service, and, indeed, Respondent dealt with the Union to a certain degree, although it declined to adopt the old contract or formally recognize the Union. The evidence is thus overwhelming that, at the time of the takeover, there was a substantial continuity of the enterprise, certainly from the standpoint of the employees. Accordingly, although the Respondent was not obligated to apply the existing contract to the employees, it was a successor under the applicable authorities discussed above, and it had the resulting obligation to bargain with the Union.

Nor does Respondent dispute that it failed to notify the Union or give it an opportunity to bargain before making changes to employee commission rates and enforcing dress code rules, which are clearly mandatory subjects of bargaining. The changes and dress code enforcement were established by the uncontradicted testimony of two employee witnesses, the only employee witnesses who testified in the trial. Tr. 116–117, 154–157. Even though the changes were made at about the time of the move to the new location, the successorship bargaining obligation had attached 10 months before and was still in existence. Before Judge Marcionese, Respondent did not assert that the employees had rejected the Union; nor did it present evidence to overcome the Union's presumption of majority support. Thus, here again, the facts and the law support the General Counsel's theory of violation.

In these circumstances, the General Counsel was not only substantially justified in alleging and litigating the bargaining violations in the complaint, but, as Judge Marcionese seemed to

⁶ In *Fall River*, cited above, the Supreme Court made it clear that the successor is not bound to apply the terms of the predecessor's bargaining agreement and may set initial terms on which it will hire the predecessor's employees. Nor is it under any obligation to hire the predecessor's employees, although it must not discriminate against union employees in its hiring. 482 U.S. at 41.

suggest in his decision, the violations would probably have been established had the General Counsel succeeded on the jurisdictional issue. He noted that the evidence “would suggest a general refusal to bargain,” thus implicitly recognizing a successorship obligation. He also noted that the evidence showed that Respondent “did not notify the Union in advance before it changed the commission rate and began to enforce the existing dress code.”⁷ My independent analysis of the evidence confirms these views. Thus, I have no difficulty in denying the Respondent’s EAJA application.

Respondent’s EAJA reply (EAJA R. 12–13) repeats its challenge to the successorship allegation in its post hearing brief to Judge Marcionese (Br. 57), because its intended new business focus included more women customers and required licensed cosmetologists rather than barbers (Br. 57). But that alleged new focus was not effectuated until Respondent’s move to its new location 10 months after its takeover from the predecessor. And it is clear, as a matter of law, that successorship is measured at the time of the takeover, as shown above. At that point, Respondent was free not to hire the predecessor’s employees and to set the initial terms under which it would employ them. Respondent did not avail itself of this opportunity. It not only hired all of the old employees and their supervisors, but, according to the uncontradicted testimony of the only two employees who testified, their working conditions remained the same. Indeed, as Judge Marcionese found, things remained the same for 10 months until Respondent moved to its new location. Moreover, assuming that whatever changes took place at the new location could be considered, it is hard to see how adding more women customers and requiring cosmetology licenses would alter the continuity of the enterprise to defeat the bargaining rights of the incumbent union. But even if these changes could somehow have resulted in a decision favorable to Respondent, this would not render the General Counsel’s case without substantial justification.

In its EAJA reply (EAJA R. 14–18), Respondent also repeats a contention made in its brief to Judge Marcionese (Br. 60–64)—that its successorship bargaining obligation would not attach, if at all, until it employed a “representative complement” of employees, which, in its view, did not take place until it moved its location and employed a total of 9 employees. It is unclear when exactly it hired new employees after the takeover, but Respondent asserted that, when it moved to its new location, it employed 9 people, which presumably included supervisors. At the time of the takeover, Respondent kept the 5 employees of the predecessor, plus their 2 supervisors. Assuming the 9 employees it employed at the new location included 2 supervisors, this would mean that Respondent added a net of 2 employees thereafter, hardly a significant increase from the

complement at the time of the takeover. Moreover, R. Exh. 27, which lists the employees on the payroll in August of 2012, seems to indicate that a significant number of them did not work full-time hours. But, here again, even assuming some support for the Respondent’s position on representative complement, the General Counsel’s contrary position was not without substantial justification.

Finally, in its EAJA reply (EAJA R. 21–26), Respondent repeats an assertion made in its brief to Judge Marcionese (Br. 52–55) to the effect that it had a viable defense to the substantive complaint allegations under Section 10(b) of the Act. That assertion is without merit, but, in any event, it does not show that the General Counsel lacked a substantial justification for the complaint allegations. As Judge Marcionese recognized, the complaint does not allege a general refusal to bargain. It only alleges a refusal to bargain “regarding two discrete subjects, i.e., the change in commission rate and the adoption of a dress code.” Thus, the only unfair labor practice allegations in this case involved the unilateral changes made after the facility was moved, and the charge was filed well within the statutory 6 month period for those allegations. Respondent focuses on the General Counsel’s contention that a successorship obligation was established at time of the takeover, which it asserts was beyond the 6 month period. But the complaint made no allegations of unfair labor practices at that point. In relying on the successorship bargaining obligation that began at the time of the takeover and continued thereafter, the General Counsel was presenting background evidence to show the existing bargaining obligation that required Respondent to notify the Union and offer to bargain about the unilateral changes. As the Supreme Court has recognized, Section 10(b) is a statute of limitations, not an evidentiary bar, and “earlier events may be utilized to shed light on the true character of matters occurring within the limitations period.” *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416–417.⁸

On these findings of fact and conclusions of law, and, on the entire record, I issue the following recommended⁹

⁸ It is, of course, of no consequence that the original charge, while using general language, focused primarily on the successorship bargaining obligation, not the unilateral changes. As the Supreme Court has stated, a charge is not the same as a pleading in a private lawsuit. It simply sets in motion the machinery of an inquiry. Thus, it is well settled that a complaint may allege other matters related to and growing out of the charged conduct. *NLRB v. Fant Milling Co.*, 360 U.S. 300, 307–309 (1959) (original charge alleged general bargaining obligation, which was dismissed, but complaint later properly issued on subsequent unilateral changes).

⁹ The General Counsel’s answer to the EAJA application also disputes the amount of the fees and expenses sought by Respondent, which was augmented by a supplemental declaration filed at the time it filed its reply. I do not reach this issue because, since the General Counsel’s case was substantially justified, no fees and expenses are awarded.

⁷ Contrary to Respondent’s suggestion (EAJA R. 19–20), Judge Marcionese did not absolve it of liability for the unilateral dress code change. While he acknowledged that there was an existing dress code, he also noted that it “may not have been enforced” under the predecessor; and he specifically stated that the Respondent did not notify the Union before it “began to enforce the existing dress code.” This was certainly a change in employment conditions and it is certainly enough to show that the General Counsel had a substantial justification for that allegation.

ORDER

The EAJA application for fees and expenses filed by Respondent is denied.¹⁰

Dated, Washington, D.C., July 12, 2016.

¹⁰ If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.